

IN THE MATTER OF : BEFORE THE
WESLEY & REBECCA JENSON : HOWARD COUNTY
T/A ARROWWOOD SHEPHERDS, : BOARD OF APPEALS
INC. :
Petitioners : HEARING EXAMINER

Section 131.I.3.c Request to Extend Time
Limits for Building Permits to Establish
Conditional Use Granted in BA Case No.
05-033C

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DECISION AND ORDER

On February 9, 2009, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard oral argument in an evidentiary hearing¹ concerning a written request by Wesley & Rebecca Jenson, t/a Arrowwood Shepherds, Inc. (the "Petitioners"), to extend the two-year time limit to obtain all building permits required to establish the conditional use approved in Howard County Board of Appeals Case No. BA 05-033C, pursuant to Section 131.I.3.c of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioners certified that copies of the requested time extension were sent by certified mail to adjoining property owners and persons who testified in BA 05-033C.

I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

E. Alexander Adams, Esquire, represented the Petitioners. Rebecca Jenson the owner of the subject property, testified to the Petitioner's efforts in establishing the conditional use. Mark

¹ Section 131.I.3.c(3) provides for a "work session" when oral argument is requested. In response to the undersigned's previous request to the County Solicitor to clarify the meaning and intent of the phrase "work session" in relation to an extension request in another case, the Solicitor's office replied by electronic correspondence dated September 12, 2007, that the most reasonable interpretation would be to equate a "work session" with an evidentiary hearing and require all the protections of due process be accorded in that proceeding, including recording testimony under oath with the right of cross-examination.

**Section 131.13.c Request to Extend Time Limits
for Building Permits in Relation to BA 05-033C
Wesley & Rebecca Jenson, t/a Arrowwood Shepherds, Inc.**

Shaffer, Carolyn Shaffer, David Owens and Donna Owens requested oral argument. Their spokesperson, David Owens, testified in opposition to the extension request.

Based upon the oral argument and evidence presented, and for the reasons stated below, I have determined to deny the request for extension.

Background

The subject property, known as 3101 Florence Road, is located in the 4th Election District on the northeast side of Florence Road about 200 feet south of Jennings Chapel Road in Woodbine (the "Property"). The Property is referenced on Tax Map 13, Block 9 as Parcel 137.

The January 17, 2007 Decision and Order issued in Board of Appeals Case No. 05-033C granted the Petitioners a conditional use for a dog kennel and pet grooming establishment in an RC-DEO (Rural Conservation – Density Exchange Option) Zoning District. The Board made the following Finding of Fact.

5. The Petitioners seek a conditional use to establish on the Property a dog-training and boarding facility for up to 10 dogs. The facility would be operated from a kennel building to be located at the rear of the Property about 100 feet from the rear lot line and about 400 feet from the front lot line. The building will consist of a one-story structure approximately 80 feet wide and 25 feet deep with 10 indoor/outdoor kennel runs on the north side of the building. The building will contain the runs, a dog bathing area, an indoor training area, an office, kitchen, laundry room and bathroom. The building will be surrounded by a 6' wood privacy fence that will extend from the front of the building to within about 10 feet of the rear lot line. This fenced area will be used as an outdoor dog training and exercise area.

The facility will be accessed from a paved driveway beginning at a point to the west of the existing driveway and running north to a paved parking area for twelve vehicles to be located in front of the building. A split-rail perimeter fence will enclose the rear half of the Property and will be gated at the driveway. The Petitioners propose to maintain the existing trees along the perimeter of the Property and between the house and the facility.

**Section 131.13.c Request to Extend Time Limits
for Building Permits in Relation to BA 05-033C
Wesley & Rebecca Jenson, t/a Arrowwood Shepherds, Inc.**

The Board's grant of the requested conditional use was subject to the following conditions:

1. The conditional use will apply only to the uses and structures as described in the petition and conditional use plan submitted, as amended, to the Board as Applicant's Exhibit #1, and not to any other activities, uses, structures, or additions on the Property.
2. No more than ten (ten) dogs (other than the Petitioners' pets) will be housed and/or boarded in the kennel at any one time.
3. Neither the garage nor the rear yard of the house may be used for activities under this conditional use.
4. All training of dogs shall take place between the hours of 9 a.m. and 8 p.m. daily.
5. The hours of operation of the kennel use shall be limited to 7 a.m. through 8 p.m. daily.
6. The Petitioner shall comply with all applicable Federal, State and County laws and regulations.

FINDINGS OF FACT

Based upon the preponderance of evidence presented at oral argument, I find the following facts.

1. The operative date for tolling Section 131.I.3.a's requirement that the conditional use be established by obtaining building permits within two years is January 17, 2009, the issuance date of the BA 05-033C Decision and Order.
2. By letter dated December 11, 2008 (the "Extension Request Letter"), and stamped as received December 30, 2008, the Petitioners requested a two-year extension (apparently) of the two-year time limit to establish the conditional use.

**Section 131.13.c Request to Extend Time Limits
for Building Permits in Relation to BA 05-033C
Wesley & Rebecca Jenson, t/a Arrowwood Shepherds, Inc.**

3. As required by Section 131.I.3.c(2) of the Zoning Regulations, the Petitioner sent by certified mail copies of the Extension Request Letter to adjoining property owners and persons who testified in BA 05-033C.

4. By letter dated January 4, 2009 and stamped as received on January 8, 2008, four adjoining property owners who received copies of the Extension Request letter, requested oral argument on the time extension request as permitted by Section 131.I.3(c).

5. The Extension Request Letter noted the following actions to establish the conditional use.

- The Petitioners expected to obtain a business loan for all costs associated with the construction of the kennel and related modifications to the property (clearing of property, building of road and parking, perimeter fencing).
- The Petitioners were unsuccessful in obtaining such a loan from the Small Business Administration and several banking institutions.
- As a result, the Petitioners had to piecemeal the construction according to personal finances: arranged for property clearing; gravel for the footprint of building (kennel); gravel parking area; built a 6-foot property fences on front left side of the training area.
- Due to the pervasive turn down of the economy any business that involves so called "discretionary spending is being carefully scrutinized by lenders and they are extremely reluctant to favorably approve extension of credit for "discretionary" business plans.
- At present time, the Petitioners are preparing the site development plan for submission. Planning and Zoning informed the Petitioners that the estimated time to get through a site development plan could take up to a year.
- With limited resources, the Petitioners have been investigated alternative structures for the kennel. For example: pre-constructed mini barns; steel building kits; office trailers; mobile homes; relocating the detached garage (already a part of the property).

6. Rebecca Jenson testified to financial difficulties in establishing the use. Referring to Applicant's Exhibit 1, a digital aerial photograph of the Property dated 2004 and marked to indicate the steps the Petitioners have taken to establish the use, she explained that the Petitioners erected a privacy fence running from behind the house and continuing along the left side, cleared the back yard, and created a parking area for the conditional use to the right of the house. The

**Section 131.13.c Request to Extend Time Limits
for Building Permits in Relation to BA 05-033C
Wesley & Rebecca Jenson, t/a Arrowwood Shepherds, Inc.**

training area is behind the house and fence, which the Petitioners cleared. She did not apply for permits because it was too expensive. Animal training occurs mostly during the weekend with occasional one-on-one training at other hours and days. The Petitioners have not submitted a site development plan.

7. Mr. Owen argued that the Petitioners have failed to meet the first criterion, that the use is established in accordance with the approved conditional use plan.

8. The two 2008 Microsoft Virtual Earth aerial photographs in Protestants' Exhibit 1 depict an animal training area and training equipment in the enclosed area directly behind the Petitioners' house.

9. Opponents' Exhibit 2, three photographs which Mr. Owens testified to obtaining from the Petitioners' website, show clearing and grading in the rear of the property and dogs being trained in this area.

DISCUSSION

Under Section 131.I.3, a Decision and Order approving a conditional use becomes void unless a building permit conforming to the plans for which the approval was granted is obtained within two years. Section 131.I.3.c(4) authorizes the Hearing Authority to grant the request if it finds that establishment of the use in accordance with the approved conditional use plan has been diligently pursued. If oral argument is presented on the request, the Hearing Authority may deny the request if any of the oral arguments allege changes have taken place in the circumstances which led to the original decision to approve the conditional use. Additionally, Section 131.I.3(c) authorizes the Hearing Authority to grant up to two extensions of this time limit, not to exceed

**Section 131.13.c Request to Extend Time Limits
for Building Permits in Relation to BA 05-033C
Wesley & Rebecca Jenson, t/a Arrowwood Shepherds, Inc.**

three years each.² Such extensions may be granted if the property owner, prior to the expiration of the conditional use approval, explains in detail the steps that have been taken to establish the use.

In this case, there is no dispute that the controlling date for establishing the conditional use is January 17, 2009.³ The Petitioners submitted the Extension Letter Request to the Hearing Authority in a timely manner, December 30, 2008, just under three weeks before the January 17, 2009 two year establishment of use deadline.

The Extension Letter Request and oral argument convince me the Petitioners have failed to establish the use in accordance with the approved conditional use plan. According to the Extension Letter Request, the Petitioners desire to construct a structure unlike the one-story, 80' by 25' structure approved, violating Condition #1. The Petitioners are using the rear yard of their house for activities under this conditional use, violating Condition #3. The Petitioners have also established a large parking area east of the dwelling, and not as required by the Conditional Use Plan, in front of the kennel building, also violating Condition #1. Lastly, the Petitioners have failed to diligently pursue approval of a site development plan, Ms. Jenson having testified that the Petitioners have not submitted such plan in the almost two-year period since the Board of Appeals granted the conditional use petition.

The Petitioners' actions since this grant of approval manifest a clear intent to materially change the uses, structures, and site plan from that which the Board approved in BA 05-033C.

² The Zoning Regulations also provide for the possibility of third extension when, as here, a previously granted conditional use has been previously modified. Section 131.I.3.e.

³ The Extension Request Letter misidentifies the expiration date as January 21, 2009. The determinative date is the date of the decision.

**Section 131.13.c Request to Extend Time Limits
for Building Permits in Relation to BA 05-033C
Wesley & Rebecca Jenson, t/a Arrowwood Shepherds, Inc.**

Because their actions and intent have materially changed, I must conclude the Petitioners are not diligently pursuing the proposed conditional use. While I am sympathetic to the Petitioners' financial circumstances, they did not seek a modification of the plan, as is permitted pursuant to Section 131.H.4. Instead, they pursued an alternative and unapproved plan.

The Petitioners' actions subsequent to January 17, 2007, indicate that Petitioners have failed to diligently pursue establishing the use in accordance with the approved conditional use plan. The extension request is therefore denied.


**Section 131.13.c Request to Extend Time Limits
for Building Permits in Relation to BA 05-033C
Wesley & Rebecca Jenson, t/a Arrowwood Shepherds, Inc.**

ORDER

Based upon the foregoing, it is this 5th day of March 2009 by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the extension request of Wesley & Rebecca Jenson, t/a Arrowwood Shepherds, Inc. (the "Petitioners"), in BA Case No. 05-033C is hereby **DENIED**.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**


Michele L. LeFaivre

Date Mailed: 3/12/09

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.